



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2004

Mr. Mark G. Daniel
Watauga City Attorney
Evans, Gandy, Daniel & Moore
115 West Second Street, Suite 202
Fort Worth, Texas 76102

OR2004-3205

Dear Mr. Daniel:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 199757.

The City of Watauga (the "city") received a request for information relating to an alleged sexual assault. You claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we must address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office a copy of the written request for information.

¹A section of one of the submitted documents does not appear to relate in any way to the alleged sexual assault claim, and we note that you have drawn a line through this section of the document. We therefore assume that the information in this section of the document is not responsive to the present request for information, and this ruling does not address such information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (1977).

Section 552.108, which protects law enforcement interests, is a discretionary exception and does not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 522 at 4 (1989) (discretionary exceptions in general). *But see* Open Records Decision Nos. 630 at 3 (1994), 586 at 3 (1991) (need of *another* governmental body to withhold information under predecessor to section 552.108 can provide a compelling reason under section 552.302). Thus, the city may not withhold any information under section 552.108. On the other hand, the applicability of section 552.101 does provide a compelling reason to withhold information from disclosure. Accordingly, we will address the city's arguments under section 552.101.

Before considering section 552.101, however, we note that the submitted information includes an arrest warrant and supporting affidavit. The Seventy-eighth Legislature amended article 15.26 of the Code of Criminal Procedure, which became effective September 1, 2003. Article 15.26 states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. The arrest warrant affidavit was presented to the magistrate in support of the issuance of the arrest warrant. Therefore, you must release the arrest warrant and arrest warrant affidavit.

Some of the records at issue are medical records, access to which is governed by the Medical Practice Act, chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the medical records that are subject to the MPA. *See* Open Records Decision No. 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay constitute protected MPA records).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In Open Records Decision No. 339 (1982), we concluded that a sexual assault victim has a common law privacy interest which prevents disclosure of information that would identify the victim. *See also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, *writ denied*) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Accordingly, we have marked the sexual assault victim's identifying information that is protected pursuant to common law privacy and must be withheld from disclosure under section 552.101.² *See* Open Records Decision Nos. 393 (1983), 339 (1982).

Section 552.101 also encompasses information deemed confidential by statute. The submitted information contains an L-3 Declaration of Psychological and Emotional Health required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") that is confidential pursuant to section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

- (a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

²We note, however, that if the requestor is the victim's authorized representative, the requestor has a special right of access, beyond the right of the general public, to the marked information that is protected by victim's common law right to privacy. *See* Gov't Code § 552.023.

- (1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and
 - (2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.
- (b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). The city must therefore withhold the L-3 form pursuant to section 552.101 in conjunction with section 1701.306 of the Occupations Code.

Social security numbers may also be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, we note that some of the submitted information is excepted from disclosure under section 552.130 of the Government Code.³ Section 552.130 provides in relevant part:

- (a) Information is excepted from the requirement of Section 552.021 if the information relates to:
- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

³The Office of the Attorney General will raise mandatory exceptions like section 552.130 on behalf of a governmental body but will not ordinarily raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the driver's license numbers we have marked under section 552.130.

In summary, the arrest warrant and arrest warrant affidavit are deemed public by article 15.26 of the Code of Criminal Procedure, and therefore must be released. The marked medical records may be released only in accordance with the MPA. The identifying information we have marked is excepted from disclosure to the general public under section 552.101 of the Government Code in conjunction with the sexual assault victim's common law right to privacy. The L-3 Declaration of Psychological and Emotional Health must be withheld under section 552.101 in conjunction with section 1701.306 of the Occupations Code. Social security numbers may be excepted from disclosure under section 552.101 in conjunction with federal law. The marked driver's license numbers must be withheld from disclosure under section 552.130 of the Government Code. The city must release the remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Hattaway", written in a cursive style.

Karen Hattaway
Assistant Attorney General
Open Records Division

KEH/sdk

Ref: ID# 199757

Enc. Submitted documents

c: Ms. Nancy Palazzetti
7041 Bennington Drive
Watauga, Texas 76148
(w/o enclosures)